Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 75-1711

ELI DANIELS AND HARRY DANIELS D/B/A THE HEART OF THE BLACK HILLS STATIONS, PETITIONERS,

V.

THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS.

PETITIONERS' REPLY BRIEF TO OPPOSITION

ELI DANIELS
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57701

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 75-1711

Eli Daniels and Harry Daniels d/b/a the
Heart of the Black Hills Stations,
Petitioners,

v.

The Federal Communications Commission and
The United States of America,
Respondents.

On petition for a writ of certiorari
to The United States Court of Appeals for
The District of Columbia Circuit.

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION

-- REPLY --

The respondents' reply in opposition did not argue against the issues presented by the petitioners' questions and supporting argument.. Thereby providing credence to the fact that the evidence presented by petitioners is conclusive and not refutable.

The respondent did however present an excuse for not acting on our application (BPCT-4077) which could be construed to reply to petitioner's question 3. In the third paragraph of its STATEMENT, respondent stated that "major change" applications are deferred pending the outcome of renewal hearings. In rebuttal to this excuse, we call attention to an important fact; That the petitioner's application had been on file some ten months before the Commission initiated renewal proceedings! This in itself makes a sham of the Commission's position that it deferred action on the application until completition of the renewal proceedings. Furthermore, this commission policy is contrary to the requirements dictated by statutes 47 U.S.C. 155(e), 309 (a) & (e) as referred to for reason to consider question 3, (Pet. 3,4,12 & 13).

The Commission does not support by facts of law and equity, its contention that this policy supersedes the requirements of compliance with administrative law.

The court is asked to consider, not

only the aspects of the laws relevant hereof, but also the equity of the nature of the Commission's action which imposed such a sanction on the petitioners which prevented the replacement of a tornado damaged antenna system that was necessary to correct the very technical violations cited by the agency. This not-with standing the fact that the agency was notified in accordance with 47 CFR 1.89(c) (1) and also in our application for license renewal.

REBUTTAL TO RESPONDENTS' QUESTION PRESENTED

The question:- "Whether a court of appeals has jurisdiction to review action by the staff of the Federal Communications Commission pursuant to delegated authority, where that action is subject to review by the Commission before becoming final."

ARGUMENT

To support its position, the Commission relies on statute 47 U.S.C. 155(d), where as Petitioners rely on 47 U.S.C. 405,since it was a final order which was released by public notice on April 2, 1975 as follows:

"Commercial Television Broadcast application DISMISSED: (no longer Commission Licensee)-- BPCT-4077, Eli Daniels and Harry Daniels d/b/a The Heart of the Black Hills Station, Rapid City, South Dakota..

KRSD-TV, Ch-7. CP to make the following changes: ERP Vis. 38.00 kW, Aural 7.6 kW; type of antenna to RCA TF12BH; antenna structure and increase antenna height above average terrain to 550.6 feet.

The full text of the letter was not released to the public.

Petitioners relied on the statute which provides judicial review for the reasons outlined on pages 8,9,&10 in their petition for writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be granted. This would be consistent with the decisions of the court cases cited for reasons to the consideration of questions 1 & 2. And also for-

The reasons given to the consideration of question 3. To deny the writ would be to sanction the non-compliance by the agency of the statutes laid down by the congress. That the agency's jurisdiction or authority to act depends upon the compliance with the statutes vesting power to it.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted

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The Heart of the Black Hills Stations,

Eli Daniels

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Date July 1976.